

April 28, 2006

Mary Rasenberger
Policy Advisor for Special Programs
U.S. Copyright Office

Dear Ms. Rasenberger:

We are submitting the following comments to the Section 108 Study Group on behalf of the American Association of Law Libraries (AALL) and the Special Libraries Association (SLA).

Eligibility for Section 108 Exceptions

AALL and SLA believe that the current criteria in Section 108(a) granting exceptions to libraries and archives should be maintained. The current standard is flexible permitting various libraries and archives to copy works for purposes other than “commercial advantage,” under certain circumstances. This language permits law and special libraries to facilitate the administration of justice and the efficient working of the legal system and government institutions. Consequently, amendment of Section 108 must be done without limiting the current flexibility under Section 108(a).

New Exemption for Archiving Electronic Information

In the electronic age, much of the collections of libraries and archives are in electronic form, or if in print, may often need to be digitized. Electronic information is very unstable and subject to inherent risks of corruption and loss. AALL and SLA believe that libraries and archives should be able to preserve at-risk portions of their collections, both print and electronic, when failure to do so may result in the loss of historical, political and cultural information.

AALL and SLA agree with the Study Group that the Section 108 “triggers” permitting archiving are generally not broad enough. At the first indication of damage to electronic information, it is often too late to save it. Consequently, Section 108 needs to be modified to permit archiving and preservation of these materials. In addition, we believe that any modification of Section 108 must recognize the important public benefits that libraries provide by archiving electronic information, which by nature is fragile and easily corrupted or lost.

As law and special libraries move to more electronic environments, materials that they would have previously owned are increasingly licensed. For the most part, such license agreements dictate the terms by which libraries may archive electronic content. However, there are instances when licenses may not apply—because the agreement is silent on the

issue—or should not apply—because the offending terms are void as against public policy. Indeed, AALL and SLA note that licenses that deny libraries their rights and responsibilities to archive electronic information frustrate legitimate public policy objectives. Therefore, the rights and privileges under traditional copyright law, including Section 108, should apply.

As a specific concern, many law and special libraries have “acquired” (through “lump sum” payments) databases with thousands of titles. A specific transaction may involve an online service with a high-quality backup electronic tape containing the entire database. There is a need to provide for technology migration and preservation copies of this information. If such online services cease operations, and libraries have discontinued important items in print, they may often be unable to fill the gaps in their collection created by reliance on licensed electronic media. In the face of this uncertainty, there is significant need for libraries to be privileged under copyright law to access and copy such electronic information for archival purposes under a more permissive standard.

Increasingly, library users are accessing their library’s collections and services remotely. Therefore, AALL and SLA also agree with the Study Group that in some instances, offsite access to items archived under Section 108 is necessary, particularly in an era of remote work and distance education. Accordingly, the present “three copy limit” is unworkable in the electronic environment.

For the reasons cited above, U.S. copyright law needs to be amended to permit access and copying of electronic information for purposes of archiving in anticipation of the inherent risks associated with such information.

New Website Preservation Exception

AALL and SLA view preservation and access to legal and government information, including information on the World Wide Web, as a prerequisite for democratic governance, accountability and the rule of law. In addition, the efficient operation of the legal system and administration of justice depend upon wide-spread access to legal and government information throughout society. AALL and SLA are concerned that primary law and other essential legal and government information are often exclusively published by commercial firms, without recourse to alternative sources within the public domain. This has been particularly problematic with state and foreign legal sources and documents, which are often only published by commercial vendors.

We are concerned that, as various states and foreign governments contract with vendors for publication of these materials, these publications will be increasingly delivered in electronic media via the Internet, and as a result may not be archived. If the publisher removes the information or otherwise ceases publication, such information may be permanently lost. Furthermore, efforts to compile significant collections of foreign legal and government materials in electronic formats—a necessity in the face of global trade, communications, and human migrations—are hindered when the information is subject to

copyright restrictions. Consequently libraries and archives perform an essential public function by archiving information from the Web.

Conclusion

AALL and SLA are very concerned about the stability of legal and government information. Stability in the information environment, especially in electronic media, is a prerequisite for the rule of law, administration of justice, and equitable and accountable democratic government. From the opening sentence of Roscoe Pound's monumental treatise, *Interpretations of Legal History* 17 (1923), "Law must be stable and yet it cannot stand still."

Threats to the stability of government and legal information, including information published by private commercial vendors, must be carefully anticipated and countered. The archiving of legal and government information published in electronic form is consequently of paramount interest to our organizations, to the broader library community and to society as a whole. We therefore call upon Congress and the Copyright Office to propose and implement necessary amendments to 17 U.S.C. § 108 which will facilitate the ability of libraries and archives to carry out their missions in the digital age.

Last but not least, we echo the concerns of other library and archival groups that revision of Section 108 by the Study Group is not the appropriate forum for visiting issues of state sovereign immunity.

Sincerely,

Paul D. Callister
Chair, Copyright Committee
American Association of Law Libraries

Mary Alice Baish
Associate Washington Affairs Representative
American Association of Law Libraries

Douglas Newcomb
Chief Policy Officer
Special Libraries Association